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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 164

VIRGIL D. DARDI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 165

CHARLES ROSENTHAL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 166

CHARLES BERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 158 Misc.

ROBERT B. GRAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND ON MOTION OF PETITIONER GRAVIS FOR LEAVE TO PROCEED IN FORMA PAUPERIS

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITIONS FOR WRITS OF CERTIORARI

OPINION BELOW

The opinion of the court of appeals (R. 1–37)[1] is reported at 330 F. 2d 316.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1964 (R. 38). Petitions for rehearing by Dardi, Rosenthal and Berman (No. 164–166) were denied on April 10, 1964 (R. 96, 98, 100), and their time to file petitions for writs of certiorari was extended to June 19, 1964. Petitions for rehearing and rehearing en banc on behalf of Gravis (No. 158 Misc.) were denied on April 20, 1964 (R. 115, 119–121), and his time to file a petition for a writ of certiorari was extended to and including June 19, 1964. On June 9, 1964, petitioners Dardi, Rosenthal and Berman filed separate petitions for writs of certiorari. On June 19, 1964, petitioner Gravis filed a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the length of the trial, due in large part to activities by defense counsel, prejudiced the petitioners (raised by all petitioners).

2. Whether petitioner Dardi (No. 164) was accorded adequate pretrial discovery.

3. Whether petitioners Dardi and Rosenthal (Nos. 164 and 165) were unduly curtailed in their right of cross-examination.

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[1] The proceedings in the court of appeals are referred to as "R.". The original transcript and the district court proceedings are consecutively numbered and will be referred to as "Tr.".

4. Whether the conduct of government counsel in cross-examination of a defense witness and summation (No. 164) was proper.

5. Whether petitioner Berman (No. 166) was prejudiced by failure to give him a copy of the transcript of his own testimony.

6. Whether petitioner Rosential (No. 165) was prejudiced when his trial attorney was incapacitated and the court assigned counsel who had previously represented a similarly situated defendant.

7. Whether petitioners Berman and Gravis (No. 166 and No. 158 Misc.) were prejudiced by the charge to the jury on willfulness and intent and whether the proof of willfulness as to Berman was sufficient.

8. Whether the calling of a witness before a grand jury investigating an obstruction of justice amounted to an abuse of process (No. 164) where the trial judge read the grand jury transcript and found that the grand jury had not been used to prepare for this trial.

STATUTES AND REGULATIONS INVOLVED

Pertinent parts of Sections 2, 4 and 5 of the Securities Act of 1933 (15 U.S.C. 77b(11); 15 U.S.C. 77d (1); 15 U.S.C. 77e(a)) and SEC Rule 133 (17 C.F.R. 230.133(a)) are found in the Appendix.

STATEMENT

Petitioners were all convicted in a jury trial in the United States District Court for the Southern District of New York of conspiracy to violate provisions of the Securities Act, the Securities Exchange Act and the mail fraud statute by selling stock belonging to a control group without registration, utilizing

fraudulent practices to sell stock, and manipulating the market (Tr. 27154–27167). Counts 2, 4 and 5, on which Dardi (No. 164) was convicted, charged the illegal manipulation of the market through stabilization transactions on the New York Stock Exchange (Tr. 27168–27171). The remaining counts charged the illegal sale of unregistered stock (Tr. 27171–27175). Petitioner Gravis (No. 158 Misc.) was convicted on counts 1 and 29; Berman (No. 166) on counts 1, 11, 12, 13, 22 and 23; Dardi (No. 164) on counts 1, 2, 4, and 5; and Rosenthal (No. 165) on counts 1, 27 and 28. The jury acquitted Gravis on count 16, Rosenthal on count 15, and Berman on counts 14, 24, 25 and 26 (Tr. 26680–26681). The total sentences were as follows: Dardi, seven years' imprisonment and a fine of $40,000; Berman, six years' imprisonment and a fine of $35,000; Gravis, five years' imprisonment and a fine of $15,000; Rosenthal, four years' imprisonment and a fine of $20,000 (Tr. 28877–28881). The court of appeals unanimously affirmed the convictions (R. 38).

Petitioner Dardi was President and a Director of United Dye, a corporation with its stock listed on the New York Stock Exchange. Petitioners Gravis, Rosenthal and Berman were stock brokers who handled the sale of United Dye stock in the over-the-counter market. As background for the questions presented, the pertinent facts may be summarized as follows:

A. The scheme

1. Control of United Dye

In June 1955, Dardi and co-conspirator Guterma arranged to purchase 38,500 shares of United Dye

(Tr. 689–696, 798–799, 718–720). These shares were divided among other conspirators; all told, they represented control of United Dye (Tr. 693–694, 749–750, 728–730). Guterma became Chairman of the Board and Dardi President (Tr. 754–755).

2. Merger arrangements

The Franklin County Coal Corporation had coal lands which had not been mined for years (Tr. 8720, 9039) and an oil pipeline whose income had been declining (Tr. 8730–8732, 8972, 8950, 22180–22182). The Franklin stock was purchased by conspirators Garfield and Pasternak for a promissory note in the amount of $510,000, with the shares being pledged as security for payment of the note (which later was assumed by United Dye) (Tr. 8784–8785, 1527). The conspirators then transferred their interest in Franklin to a corporate shell, Handridge Oil Corporation, whose stock was held in the names of nominees to disguise its actual ownership by "control persons," which would have required registration under the Securities Act of 1933 (Tr. 779, 781–783, 817–822, 830, 835). Dardi and Guterma also arranged for members of the Board of Directors of United Dye to obtain an additional 75,000 shares of United Dye stock which were to be sold without compliance with the registration requirements relating to sales by "control persons." They accomplished this by making 75,000 shares of Handridge available to nominees of the Board at $10 per share, with the knowledge that Handridge stock would automatically be con-

verted to United Dye when a merger occurred (Tr. 881–884, 901–906, 5575–5580, 1350–1351).

On December 5, 1955, United Dye and Handridge executed a merger agreement to take effect May 1, 1956, under which 575,000 shares of United Dye would be given in exchange for 575,000 shares of Handridge stock and $750,000 cash (obtained by the sale of the 75,000 shares of Handridge, see *supra*) (Tr. 787, 789, 802, 808, 810, 812, 813, 893, 901–905). Meanwhile, Dardi and others sold the bulk of their original United Dye shares in order to reduce the price at the time of the merger and thereby lessen the scrutiny to which the transaction would be subjected (Tr. 923–929, 1187).

Dardi and others arranged to have the 575,000 shares listed on the stock exchange by exaggerated claims as to the value and potential of the Franklin properties and by nondisclosure of the true ownership of Handridge and the pledged Franklin stock (Tr. 7325, 8050, 8097–8104). Dardi and Guterma also arranged to have United Dye obtain control of Bon Ami, whose treasury ultimately provided the cash funds not only for the purchase of its own control stock, but also for the redemption of the pledged Franklin stock (Tr. 1343–1358, 1513–1514).

As part of the merger, conspirators Garfield and Pasternak had pledged 85,000 shares of United Dye to guarantee that Franklin would produce $1,200,000 in profit in 1956 and 1957. Two months after the merger, this was waived in return for a payment of $800,000, part of which came from United Dye itself (Tr. 1546–1582). The shares were then worth $1,

200,000 and the guarantee could not have been fulfilled (see *supra*).

3. Boiler-room sales of unregistered control stock

After the merger, it was agreed to sell the United Dye shares that had been obtained through the merger on the over-the-counter market, while watching the exchange market for any possible reaction (Tr. 1587–1601, 1620, 16725). When it was discovered that one of the conspirators had sold some of the stock on the Exchange, Dardi and Guterma convinced him to stop, but only after it was agreed to set up an over-the-counter boiler-room operation for selling all the shares (Tr. 1597–1601). Thereafter, over 500,000 shares of United Dye stock were sold through over-the-counter boiler-rooms, in part by petitioners Rosenthal, Gravis and Berman (Tr. 1620, 1629, 1632, 17627–17632, 17996–17997, 23660, 23668).

In order to obtain a successful boiler-room distribution, the conspirators used false press releases and "tout" sheets prepared by Hughes and approved by Dardi and Guterma (Tr. 11794–11796, 11802–11803, 6829–6832), a false "tout" sheet called "Duval's Consensus" (Tr. 11730, 11794–11797), and a false brochure distributed to the brokers (Tr. 11862, 1639–1640, 11794–11796, 8602–8605).

4. Market manipulation.

Meanwhile, in order to maintain the market price, Hughes, Guterma's aide, was instructed to purchase any United Dye stock which was offered on the Exchange, whenever there was no willing purchaser (Tr. 1591–1593, 1673, 11829–11837). Dardi arranged to have Hughes use his brokerage account and the names

of others (Tr. 11845–11849, 12904–12908). Since purchases through a foreign bank could be made at approximately 30 per cent margin (Tr. 1668), Dardi suggested that defendant Herman Brann, who owned a bank in Tangier, Morocco, could be of assistance (Tr. 1664–1665). After various meetings (Tr. 12865, 12869–12882, 1667–1671), an agreement was reached with Guterma's lawyer, Louis Levin (Tr. 12886–12887), to transmit the funds through a Liechtenstein bank account under control of Levin (Tr. 12888–12910). Thereafter, Brann received $210,000 for purchases of United Dye stock (Tr. 12931-12937) to be resold in Europe, Africa and the Near East (Tr. 12886, 12920). Part of the sales price was returned to Dardi and Guterma (Tr. 12983–12984, 13007, 13229, 1673). Petitioner Rosenthal also assisted in stabilizing the market (see Tr. 16689–16780). These manipulations maintained the Exchange price during the period of boiler-room sales.

B. Participation by petitioners

1. Dardi

The evidence against petitioner Dardi, showed that he had been told prior to the merger that the stock would be held by nominees and, shortly after the merger, would be sold, but not on the stock exchange (Tr. 808–817, 880–882, 12881, 1594–1597). Furthermore, his personal assistant maintained a check on the exchange sales immediately after the merger (Tr. 6476, 1589–1597, 1744). Finally, Dardi reviewed and approved the false material for use in brochures to aid the over-the-counter sales (Tr. 1639–1640, 11794–

11796) and was advised by brokers of the progress and sales (Tr. 9382, 11934–11936, 16783).

2. Berman

The evidence showed that petitioner Berman made arrangements personally with Guterma to sell United Dye in the "over-the-counter" market, at a meeting at which Berman did not "want anybody else present". Berman was told that "any amount" he could sell would be available and that the stock was to be sold at the last closing price on the Exchange each day. The special "terms of compensation" were that brokers would get 15 per cent commission by "check" (rather than the New York Stock Exchange commission of approximately one-tenth of 1 per cent plus $39 for sales in lots of over $5,000 (Tr. 10089–10090)), and an unrecorded $1 "in cash" per share (Tr. 1631–1638, 16766–16769). When Berman called Guterma about a drop in price on the Exchange, Guterma told him not to be disturbed, and that efforts were being made regarding the "market stabilization" (Tr. 1636–1636A). Berman knew that stock sold for a "control group" had to be registered (Tr. 23845–23846).

3. Gravis

The evidence against Gravis, who was owner of the firm, R. B. Gravis, Inc. (Tr. 11924, 15655, 15664), showed that he told Hughes (a Guterma aide) that he was interested in selling United Dye. Hughes introduced him to Guterma (Tr. 11923–11924). Gravis was told that over 500,000 shares were available but could be sold only over-the-counter. He was assured that this would not affect the price which

would be maintained on the Exchange. Guterma also told Gravis of the proposed compensation, *i.e.*, 15 per cent by check and $1 in cash (Tr. 1628–1638, 11923–11928). When the SEC made inquiry regarding the sale of United Dye, Gravis said that his clients were not persons in control and that "there was no connection with Mr. Guterma" (Tr. 15653–15677).

4. Rosenthal

The evidence as to petitioner Rosenthal indicated that he and defendant Barkley, who pleaded guilty, each had a fifty per cent interest in I. F. Stillman & Company. The president of that company was used as a front because Rosenthal had been enjoined from engaging in the brokerage business and Barkley had been indicted for securities fraud (Tr. 16757–16759, 16688, 16924). After Rosenthal had executed an order to buy United Dye shares on the Exchange, in order to manipulate the market price (see *supra*), a meeting was arranged with Guterma and others at which Rosenthal agreed to sell Guterma's shares for a commission of 15 per cent plus a five per cent unrecorded cash payment (Tr. 16690-16705, 11866–11868). At another meeting, Guterma explicitly informed Rosenthal that the group, which controlled approximately 550,000 shares, wanted the stock sold on the over-the-counter market on the same conditions (Tr. 1620–1621, 16724). When Barkley expressed concern that the sales were coming from a controlled group, Rosenthal suggested that they obtain letters showing that the sales were made for individuals who "were not members of the control group" (Tr. 16724). Rosen-

thal also assisted in purchasing United Dye shares on the Exchange in order to rig the market price (Tr. 16697–16703, 16749, 16761–16764, 16775–16776, 16722–16725).

C. Concluding events

In April 1957, Guterma resigned as Chairman of the Board and disposed of his remaining control shares (Tr. 1742–1746). In the fall of 1957, conspirator Garfield informed Guterma that arrangements had been made for former Senator George Bender to intercede with the SEC and to urge that it refrain from recommending criminal charges (Tr. 1788–1789, 18476). United Dye's attorney, Lehrich, who was sent to Bender, dictated the memorandum that formed the basis of Bender's report (Tr. 1791–1795, 18193–18195, 18480–18481, 18781, 18924–18925). Dardi was informed of the trip (Tr. 18194–18195). Later, Dardi told Lehrich that he had made a commitment to pay $20,000 of the $100,000 given to Bender, but that he was then short of funds (Tr. 18189–18191). In early 1958, records of United Dye were destroyed by Dardi, Brann and Guterma (Tr. 13537–13542).

ARGUMENT

While petitioners do not question that a scheme to defraud was proved, each contends that his participation was minor or unknowing. As shown in the Statement, however, the contention is without basis; for each petitioner played an important and essential role in the conspiracy.

The scheme embraced the following steps: (a) gaining control of United Dye, a corporation listed

on the New York Stock Exchange; (b) obtaining a large number of shares of United Dye stock through a merger; and (c) selling those shares (which should have been registered under the Securities Act of 1933) to the public on the "over-the-counter" market by means of high pressure "boiler-room" tactics, while artifically stabilizing the market price on the Exchange. Thus, for the conspiracy to succeed, it was essential that the Exchange market be stabilized while the control shares were dumped (as charged in the substantive counts against Dardi), and at the same time that the huge volume of unregistered control shares be sold outside of the normal channels of the Exchange, in the "over-the-counter" market (as charged in the substantive counts against the brokers—Berman, Rosenthal and Gravis). That the brokers knew of the illegality was an inevitable inference from the proof of their personal contact with Guterma, the huge volume of stock available, and the special commission arrangements. It is against this background of a strong, although complex, government case that the various issues raised by petitioners should be viewed.[2]

1. Length of the trial

All petitioners contend that they were prejudiced by the lengthy trial (No. 164, Pet. 41–52; No. 165, Pet. 21–28, 34–39;[3] No. 166, Pet. 9–15; and No. 158 Misc.,

[2] The trial judge described this case as proved to the "hilt" (Tr. 26712).

[3] Petitioner Rosenthal claims that the government stated he could be tried in four days (Pet. 21, 23, 34). This is not supported by the record; no other petitioner so claims; and the gov-

Pet. 13–23). This matter was fully and carefully considered by the court below, which found that petitioners had not been deprived of a fair trial. There is no occasion for further review.

In view of the enormous complexity of the scheme charged in the indictment, involving as it did the acquisitions and merger of corporations and the elaborate manipulations of stock, it was inevitable that the trial would be a lengthy one. While eleven minor defendants (all salesmen) were severed on motion of the government, it was necessary as to the others (including the three broker petitioners)[4] to prove the entire scheme if the role of each defendant was to be made clear to the jury. As it happened, eleven defendants pleaded guilty, during the trial, leaving only the guilt of petitioners and one corporate defendant to be decided by the jury. But the necessity of proving the nature of the conspiracy remained, both as to Dardi, who was at the center, and as to the brokers, whose complicity depended upon proof justifying the inference that they knew they were dealing with stock owned by "control" personnel.

Moreover, to the extent that the trial may have been unduly prolonged, petitioners, themselves, bear a substantial share of the responsibility. Indeed, in complaining of the length of the trial, they are placed in the anomalous position of arguing that the judge should have curtailed colloquy, largely of their own

ernment specifically denied making such statement in the reply brief below.

[4] Four defendants had pleaded guilty before trial and two did not appear.

counsel (cf. *infra* as to allegations of undue restriction on cross-examination). Furthermore, the court noted on the record the inordinate amount of time that defense counsel consumed between questions and rummaging around for papers (Tr. 12034–12035, 26701). And while the proper extent of cross-examination is admittedly a debatable subject, it is noteworthy that the time used by the defense in cross-examining the government's witnesses far exceeded the time used for direct examination.[5]

Despite the length of the trial, however, the record shows that the jury gave the case full consideration. Their deliberations began on Thursday, January 31, 1963 (Tr. 26550), continued through the weekend, and resulted in a verdict at 12:25 p.m. Monday (Tr. 26679). During this period they requested numerous pertinent exhibits. While Dardi was convicted on all

[5] (*E.g.*, government's direct examination of Guterma used 429½ pages, while cross-examination consumed 1,130 pages; direct examination of Paulson filled 54 pages, cross-examination 226½ pages; direct examination of Lehrich required only 6 pages, as compared to 252 pages for cross-examination.)

In one instance, moreover, the court was obliged to record a deliberate delay of a full day by defense counsel (Tr. 17033, 17038–17049, 17062). On another occasion, defense counsel requested the government to produce a document to refresh a witness's recollection of the names of subscribers to 75,000 shares of United Dye (Tr. 4182). After a colloquy as to the bona fides of the request (Tr. 4196-4197, 10800–10802) the document was produced, but it was never used (Tr. 4201–4208). It later developed that counsel had the very same information in a letter from the escrow agent (Tr. 4239–4241). Counsel twice opposed extending the hours of trial (Tr. 6162–6171, 7376, 7393), although the jury itself shortly afterward requested and obtained an extension of the trial hours (Tr. 7398–7400; see also Tr. 19295–19301).

submitted counts, the other petitioners were all acquitted on at least one count (Tr. 26680–26681). These facts indicate that the jury conscientiously considered all claims under the court's instructions and thus that the length of the trial did not deprive petitioners of a fair trial.

The length of a trial is not a reliable measure of its fairness. Here the prolongation of the trial was due, at least in part, to the trial court's painstaking effort to be fair to all defendants. While the length of the trial may have been unfortunate, a review of the record fails to show either that petitioners took affirmative steps at the trial level to alleviate the situation or that any petitioner was actually prejudiced.

2. Pre-trial discovery

Petitioner Dardi's complaint that he was denied proper pre-trial discovery (No. 164, Pet. 31–41; see also No. 158 Misc., Pet. 15–17) is wholly unwarranted. The fact is that he had considerable pre-trial discovery but chose not to avail himself of the opportunity.

The indictment was filed on July 14, 1961. Since there had been previous indictments counsel were not altogether unaware of the charges or materials (see Tr. 29166–29172). He was supplied with an extensive bill of particulars (Tr. 28371–28430, Document No. 135).

Dardi's discovery motions were in two parts. One listed 55 items (see Tr. 29175–29176), some of which were withdrawn during argument (Tr. 29177). Those documents which had been obtained by the SEC were available for inspection on request at the SEC office

in New York (Tr. 29216–29217, 29347–29349, 29211–29212). (1) Of the 55 requested items, five which referred to overt acts involving Dardi were withdrawn during argument (Tr. 29177) (Nos. 1, 4, 5, 13, and 14). (2) The remaining items through No. 29 are mostly other defendants' letters, checks or memoranda referred to in the overt act charges of the indictment to show that others were in the conspiracy (Tr. 27577–27580). The government had returned most of the originals to the companies or individuals (Tr. 28278) and had originally obtained only copies of many items (Tr. 29221–29222). There was no showing that these were material to his defense or that they were unavailable elsewhere. (3) Dardi was not even named as a defendant in counts six through thirty (Tr. 27604–27608, 29174), and thus items 30 through 54, composed of fraudulent mailings and confirmations by others mentioned in those counts, were not discoverable by Dardi. In any event, the government voluntarily supplied all confirmations (items 41 through 54) by attaching them to the bill of particulars (see Tr. 28379–28390); it also attached to the bill of particulars some brochures requested in the first 29 items (Tr. 29176). (4) Item 55 was a request for any statements made by Dardi, or other defendants and co-conspirators, to the government, the SEC, or other agency. Any testimony which Dardi or his co-defendants had given before the SEC could be inspected at the New York office (Tr. 29352). Statements of others were not producible under 18 U.S.C. 3500, unless the maker of the statement took the witness stand in the government case. In short, none of these 55

items was necessary for trial preparation by this petitioner.

The trial judge stated, during argument on the motions, that the purpose of Rule 17(c), F.R. Crim. P., was to prevent delays in trial and that the government knew what material it was going to use (Tr. 29219–29220). The government suggested that by the time of a pre-trial conference it would have all that material available, and if all counsel would sit down and examine it, they could stipulate to its authenticity—not relevance or materiality—and thus save many witnesses (Tr. 29220–29221).

The second motion was a supplemental request by Dardi for (1) all correspondence among the defendants and co-conspirators during 1955, 1956 and 1957 and (2) all recordings of telephone conversations (Tr. 29178, 28019–28026, Doc. No. 111). The government argued that this material was not producible, since none of it could be used in evidence (Tr. 29179–29180, 29227, 29263–29265). In addition, the government stated on the record that it was not in possession of any illegal wire taps (Tr. 29228–29229). This second motion was merely a fishing expedition. It was only after full argument and discussion of other arrangements that the discovery motions were denied.

Thereafter, on February 15, 1962, after service of the government's bill of particulars, the court held an informal, off-the-record, conference with the government and with defense counsel in the hope that "by the time I get through with the Government and defense counsel there will be a very considerable amount

of additional material available to all defense counsel". This was being done, he explained, regardless of his previous orders disposing of the motions (Tr. 29304). Included on the agenda were a discussion of additional documents and information from the government and the possibility of stipulation as to authenticity or other formal facts (Tr. 29315). The primary purpose of the conference was to assist counsel in preparing for trial and to avoid surprise (Tr. 29316). At this meeting the government attorney gave defense counsel a list of 65 itemized records that were available in his office for inspection (Tr. 29329; see Doc. No. 137, Tr. 28432–28435). It was agreed that counsel would discuss and negotiate the admission into evidence of various documents without producing witnesses from the banks, brokerage houses and similar institutions. After the defense had seen the documents, they would consider stipulations as to the authenticity of specific items (Tr. 29332–29333). Pursuant to this agreement the government prepared a list of 44 institutions, enumerating the categories of documents associated with each (e.g., checks, minutes, etc.; see Doc. No. 139, Tr. 28442–28446), and drew up a proposed general agreement to negotiate in good faith as to the authenticity of any documents which could not be immediately agreed upon (Tr. 29353–29355). As to this group of documents, which Dardi now states were "the truly meaningful documents" (No. 164, Pet. 35), it was defense counsel who rejected the offer despite the fact that the government had no objection to a change in phrasing (Tr. 29354–29355; cf. No. 164, Pet. 35–36). As a result of this outright

rejection, the government was forced to call numerous documentary witnesses.[6]

Everything required under *Bowman Dairy Co.* v. *United States*, 341 U.S. 214, was offered, but counsel for Dardi neglected to avail themselves of the opportunities offered.[7] Even so, the judge, who approached the motions in terms of "fundamental fair play" (Tr. 29394), repeatedly stated that, if necessary, he would adjourn the trial if the defendants were confronted with a mass of unfamiliar documents (Tr. 29398-29399, 29406, 29416). The court noted that it was dealing with experienced counsel (Tr. 29415) and, that, since this case—unlike the typical tax or anti-trust case—would require the testimony of live witnesses, as well as merely documentary evidence, he preferred to get the case "underway" (Tr. 29418-29419). Less than 10% of the documentary evidence was introduced through the first witness, who was on the stand from March 9, 1962, until May 25, 1962, including a recess for illness. Dardi's counsel did not have to commence his cross-examination until seven weeks after trial began.

[6] In fact even during trial after once agreeing to the authenticity of certain bank checks, defense counsel were allowed to be relieved of the stipulation which necessitated a further government witness (Tr. 9136-9150, 10134-10138).

[7] Only one record was turned over to the United States Attorney's office by a defendant. This was available for inspection under Rules 16 and 17, F.R. Crim. P., and its discovery was not sought (Tr. 29390-29391; see also Tr. 29387). Only Berman and Swann availed themselves of the opportunity to see the government's records on a Saturday (Tr. 29393). Although some counsel sought and were allowed to inspect documents at the SEC, months before trial, Dardi's counsel did not apply for such permission until February 19, 1962 (Tr. 29388).

He had ample opportunity to prepare both before and during trial.

3. Curtailment of cross-examination

In contrast to the foregoing contentions, petitioner Dardi and Rosenthal complain of "curtailment" of cross-examination.

A. Witness Lehrich

Petitioner Dardi asserts that he was limited in the cross-examination of witness Lehrich (No. 164, Pet. 53–56). Lehrich testified on direct examination to his part in, and knowledge of, the Bender matter (see statement, *supra*). This testimony covered six pages (Tr. 18188–18191, 18193–18195). When Dardi's counsel sought to cross-examine Lehrich as to the whole conspiracy, he was limited by the trial judge to the matters covered on the direct examination. Even so, the cross-examination consumed 250 pages (Tr. 18417–19238). The limitation was in accord with the general federal rule. See *United States* v. *Minuse*, 142 F. 2d 388, 389 (C.A. 2), certiorari denied, 323 U.S. 716, which was particularly appropriate in view of the length of this trial. In any event, Lehrich was readily available (Tr. 19323) and counsel could have called him as part of the defense (Tr. 18447, 18451).

B. Witness Smith

Petitioner Rosenthal claims (No. 165, Pet. 29–34) because he was not permitted to read a list of questions to his own witness Smith in front of the jury, knowing that Smith could and would claim the privilege under the Fifth Amendment. Smith's claim of

privilege, based on his close relationship to the alleged conspiracy as a stock salesman in Rosenthal's firm, was undoubtedly valid (Tr. 23126–23128, 23162, 23168–23170), (see *Malloy* v. *Hogan*, No. 110, O.T. 1963, decided on June 15, 1964). Accordingly, petitioner had no right to present his case by leading questions to which the witness would refuse to answer on Fifth Amendment grounds.

4. Alleged misconduct of the prosecution

A. Cross-examination of McCollom (Raised in No. 164, Pet. 69-72)

Government witness Brann had testified against Dardi (see Statement, *supra*). Defense witness McCollom testified that Brann's reputation in Geneva, Switzerland, was "just as poor as it could be" (Tr. 19970–19971), and that Brann had given false testimony (Tr. 19882, *et seq.*).

On cross-examination, the government sought to show that McCollom had a motive to testify falsely and was biased against Brann. The government asked whether there was a warrant outstanding for his arrest in Geneva on charges of embezzling money (Tr. 19977, see 19979). McCollom denied it, and under the familiar rule against impeaching on a collateral issue, the government was bound by the answer. Contrary to petitioner's claim, there was sufficient basis for the question. McCollom admitted that the bank brought a claim against him which he had discussed with Brann (Tr. 19982, 19986–19989), and defense counsel conceded that there was not the slightest question but that the prosecutor had been so informed by Brann (Tr. 20044). In the context of this

lengthy and complex trial, this minor incident had no significance. Certainly it did not constitute such prejudicial error as to require reversal.

B. Government's summation (Raised in No. 164, Pet. 57–62)

Nor was it prejudicial error, as Dardi claims, for the government to devote a small portion of its summation to answering challenges as to its reason for not calling certain witnesses. Although complaining about the length of the trial, defense counsel, in their closing remarks to the jury, demanded an explanation as to why the government had not produced two additional witnesses involved in the conspiracy, Lehrich and Eveleigh.[8]

Thus, in regard to Eveleigh, Rosenthal's counsel stated (Tr. 25229–25231):

> * * * isn't it the duty of the government to say, "There are no other witnesses;" or "there are other witnesses who would only duplicate the testimony."
>
> * * * * * *
>
> * * * I can't tell you what Mr. Walpin [the government counsel] is going to say but I know that it would not seem reasonable to think he would say, "I didn't want this case to last too long so I didn't bring him in * * *."

Berman posed a similar challenge (Tr. 24936, 24991–24992):

> * * * Where is Mr. Eveleigh? The government didn't bring him in and the reason the govern-

[8] Co-conspirator Lehrich, who testified as to the Bender incident, was general counsel for United Dye. Co-conspirator Eveleigh was Guterma's bookkeeper (Tr. 728).

> ment did not bring him in is only one purpose, and the purpose was that the lists do not exist * * *.
>
> * * * * * *
>
> Mr. Walpin cannot say or give any reason, I don't believe, why these witnesses were not called, except that in his opinion as a competent attorney these witnesses would exculpate me and would disprove the contentions of the government in this case * * *.[9]

In these circumstances government counsel properly deemed it appropriate to make some response. His remarks indicate no personal knowledge of specific testimony. In substance he explained that Lehrich in fact had appeared, that both witnesses were readily available to the defense (Tr. 25546), and that the government's decision whether to call further witnesses was based upon a balancing of the sufficiency of the proof already adduced against the need of spending additional time on cumulative evidence (Tr. 25545). This explanation was clearly responsive to the challenges. Accordingly, in context, these remarks were not error. *Isaacs* v. *United States*, 301 F. 2d 706, 737–738 (C.A. 8), certiorari denied, 371 U.S. 818.

5. Transcripts of Berman's previous testimony

Petitioner Berman complains that it was unfair not to allow him to inspect his prior testimony before the New York Attorney General and before the SEC—testimony which was used by the government on

[9] See also remarks of Dardi's counsel on the failure to call Garfield (Tr. 25420–25421).

cross-examination (*Berman*, Pet. 18–20). The short answer is that, since Berman abandoned his request for the New York Attorney General's transcript and obtained a copy of the SEC testimony by other means, he can show no prejudice.

While Berman was under direct examination, the court denied his application for the New York transcript was premature (Tr. 23465–23467, 23539–23540, 23571). After the government, on cross-examination, had used certain questions and answers from the New York transcript, the court assured counsel that it would read the transcript to make certain that no unfair advantage had been taken by selective questions (Tr. 23755). Counsel said he thought it had been agreed that, after cross-examination, the transcript would be made available. The court suggested that counsel obtain the transcript of the discussion and "we will discuss it tomorrow morning" (Tr. 23756). No further request was ever made for the New York transcript [10] (although there was a further request for the SEC testimony, see *infra*) and the court made no final ruling.

The same procedure was followed as to the SEC transcript, which likewise was used on cross-examination and then reviewed by the court except that in this case counsel continued to press for permission to examine the document. The court below held that the request should have been granted but that, in the circumstances of this case, the denial was not prejudicial, since petitioner obtained a copy from another

[10] The trial court stated it did not contain any reference to United Dye (Tr. 23530).

source. After so doing, petitioner made no attempt to reopen the case to use the transcript but sought only to have it admitted in evidence, a request which was denied (Tr. 24083–24085). There has never been any showing as to how the transcript of his prior testimony would have aided Berman, who was unable to convince the jury of his innocence by his direct testimony on the stand. Under the circumstances, the court below, which has settled the procedure in that circuit for the future, was correct in ruling that the error in failing to produce the transcript did not warrant reversal of the conviction.

6. Substitution of counsel for Rosenthal (No. 165, Pet. 12–21)

In April 1962, there was an indication that Petitioner Rosenthal's attorney might be ill, and the court advised him to make arrangements for representation (Tr. 2973–2974, 2997). On May 10, 1962, petitioner's counsel was taken to the hospital and the court suggested that petitioner take immediate steps to obtain a substitute (Tr. 5263–5270, 5272). On May 14 petitioner advised the court that he had a lawyer, provided financial terms could be agreed upon. The proposed counsel claimed that he would need several months for preparation. The court thought that an adjournment of that length could not be granted, but agreed to consider a postponement until May 21 (Tr. 5307, 5308, 5321, 5324, 5328, 5331, 5336). On May 16 the lawyer refused to participate without at least a month and a half to make ready (Tr. 5339–5340). On May 17, after further efforts to retain counsel had come to nought (Tr. 5349, 5360),

the court appointed Mr. Edward Bobick, who then represented another defendant, a corporate brokerage house, and who, until May 10, had represented an individual defendant charged with acts similar to those of Rosenthal.[11] The court also offered to assign an office associate of petitioner's retained counsel, but this was declined (Tr. 5308–5309, 5276, 5359, 5367). Although Mr. Bobick objected to the appointment, claiming a conflict (Tr. 5375), the court could find none (Tr. 5277, 5359–5363),[12] and none is indicated in petitioner's brief. *Glasser* v. *United States*, 315 U.S. 60, cited by petitioner, is thus inapposite. In any event, Mr. Bobick's corporate client pleaded *nolo contendere* and was severed prior to any possible conflict, and appointed counsel agreed that he could properly and adequately defend petitioner (Tr. 16633–16634). In these circumstances no prejudice did or could result.

7. Issues as to wilfulness

A. The proof of the charge

Petitioner Berman contends that wilfulness was not sufficiently shown or properly charged (No. 166, Pet. 15–18). We disagree. The record shows that Berman dealt personally with Guterma at a meeting which he wanted no one else present. The jury could infer that he knew that only a control group could represent that such huge quantities of shares were available. Furthermore he was selling exchange stock at a com-

[11] The individual defendant had been severed after suffering a heart attack.

[12] On May 21, 1962, the court of appeals denied an application for a writ of prohibition which sought to block this assignment of counsel (Tr. 5439).

mission, partially unrecorded, which far exceeded the ordinary brokerage fee. He personally knew the market was being stabilized. He admitted that he made $300,000 on a $3,000 investment in the brokerage company (Tr. 23667–23668). In these circumstances the jury was justified in concluding that his participation was not innocent.

The court instructed the jury that, in order to convict, it was obliged to find beyond a reasonable doubt that each defendant knowingly and wilfully committed the elements of a crime. It defined "wilfully" as "knowingly, deliberately and with an evil motive or purpose" (Tr. 26414–26415). No exception was taken to this charge. The court also instructed that the government, in order to prove wilfullness, need not establish that the defendant knew he was breaking a "particular" law (Tr. 26415). This charge, while correct, was superfluous as to Berman, who admitted knowing that stock sold for a control group was required to be registered (Tr. 23845–23846).[13]

B. Charge on Rule 133 of the SEC (No. 158 Misc., Pet. 24–34)

Gravis requested that the jury be instructed to take into consideration, on the question of good faith, the uncertainty of the application of Rule 133, which provides that the transfer of shares on certain approved mergers shall not be considered a sale for reg-

[13] This is not a case like *Bloch* v. *United States*, 221 F. 2d 786, 789 (C.A. 9), where the jury had to presume that a defendant intended the natural consequences of his acts. See also *Morissette* v. *United States*, 342 U.S. 246, 273. Here there was much more than mere proof of the sale of the unregistered stock.

istration purposes under Section 5 of the Securities Act of 1933 (Appendix, *infra*). Such an instruction was unwarranted. There was no trial evidence (Gravis did not testify in his own behalf) to support *his* claim of uncertainty. No claim was made that Gravis had relied upon legal advice that the merger was exempt (cf. *United States* v. *Crosby*, 294 F. 2d 928 (C.A. 2), certiorari denied *sub nom. Mittleman* v. *United States*, 368 U.S. 984), and he can gain no aid from opinion letters received by Berman (Gravis Pet. 29). Indeed, those letters warned that the sale of unregistered stock was legal only if the shares were not being sold by a control group. Moreover, Rule 133, which applies to "no sale" shares distributed in a statutory merger, clearly does not purport to immunize such shares from registration requirements upon subsequent sales by officers or persons in control. The court was thus more than fair when, in charging the jury, it stated that if a man in good faith seeks advice of a lawyer, gives him all the facts, and honestly follows that advice he cannot be convicted of a crime which requires willful and unlawful intent, even if the advice is erroneous (Tr. 26418-26419).

8. Grand Jury investigation (No. 164, Pet. 62–69)

From December 18, 1961, until May 15, 1962, the government unsuccessfully sought to subpoena witnesses who could identify certain United Dye records. The first subpoena *duces tecum*, directed to the treasurer of Chemoil Industries, Inc., successor to United Dye (Tr. 2847), brought assurance from counsel for Chemoil (who was also Dardi's counsel) that the

documents were being collated (Tr. 28347). After numerous inquiries, defense counsel eventually filed a motion to quash, which was denied. On February 21, 1962, counsel stated that they would specify who could appear and identify the records (Tr. 28347–28351, 28353, 28355, 28363, 29312, 28596–28599). Upon commencement of the trial, the government made repeated but fruitless efforts to secure a witness to identify the records. On April 10, 1962, six weeks after the trial began, counsel for Szabo Food Services, Inc., successor to Chemoil, stated that he would locate someone to identify the records, but no one appeared, despite a second appearance by counsel and a further subpoena which prompted the court to suggest that the record warranted a contempt proceeding (Tr. 2837–2851, 2937–2954, 3692–3701).[14]

On May 9, 1962, two months after trial began, Illinois counsel for Szabo, advised the government that Mr. Timm would come from California on Friday, May 11, 1962, to identify a portion of the records (Tr. 5354–5355). Instead, Timm who had been Dardi's secretary (Tr. 1589), communicated with Dardi, who flew that week-end to California (Tr. 5355).

On May 15, 1962, the government called Mr. Timm before the grand jury and commenced an investigation (Tr. 5353). Dardi's counsel moved for a

[14] Chemoil's treasurer gave his subpoena to Dardi's counsel and informed the government he could not identify the records (Tr. 28599). Counsel for Szabo, instead of supplying someone to identify the records, gave the memorandum which the government had given him, to Mr. Kostelanetz, attorney for Dardi (Tr. 2937, 3695–3696).

mistrial to suppress all evidence and leads obtained from Mr. Timm (Tr. 5415–5418). The court read the grand jury testimony and, while noting that 45 out of 300 questions did not, on their face, clearly relate to compliance with the subpoena *duces tecum* (Tr. 7231), concluded nonetheless that the purpose of the proceding was not, even in part, to prepare for trial (Tr. 7235). At the trial, Timm merely identified records (see Tr. 6475–6488, 6530–6542, 6552–6574).

These facts establish that the government conducted a legitimate grand jury investigation into a possible criminal offense and was not using the grand jury as a device for obtaining leads for the trial which was already well under way. The procedure employed by the district court, in reading the transcript to ascertain whether the purpose was legitimate, was the proper method of determining the issue. See *In re Grand Jury Investigation* (General Motors Corp.), 32 F.R.D. 175, 183 (S.D.N.Y.), appeal dismissed, 318 F. 2d 533 (C.A. 2), certiorari dismissed, 375 U.S. 802; *United States* v. *Pack*, 150 F. Supp. 265 (D. Del.); *Application of Iaconi*, 120 F. Supp. 589 (D. Mass.); *Application of Texas Co.*, 27 F. Supp. 847 (E.D. Ill.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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APPENDIX

Statutes and Regulations Involved

Section 2, paragraph 11, of the Securities Act of 1933, 48 Stat. 75, as amended, 68 Stat. 684, provides (15 U.S.C. 77b(11)):

> The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

Section 4 of the Securities Act of 1933, as amended (68 Stat. 684), provides in pertinent part (15 U.S.C. 77d(1)):

> Exempted transactions.
>
> [Sec. 4.] The provisions of [Section 5] shall not apply to any of the following transactions:
>
> (1) Transactions by any person other than an issuer, underwriter, or dealer;
>
> * * *

Section 5 of the Securities Act of 1933 (48 Stat. 77), as amended (68 Stat. 684), provides in pertinent part (15 U.S.C. 77e(a)):

> [SEC. 5.] (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or
>
> (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

17 C.F.R. 230.133(a) (SEC Rule 133) provides:

> DEFINITION FOR PURPOSES OF SECTION 5 OF THE ACT OF "SALE", "OFFER", "OFFER TO SELL", AND "OFFER FOR SALE".
>
> (a) For purposes only of section 5 of the act, no "sale", "offer", "offer to sell", or "offer for sale" shall be deemed to be involved so far as the stockholders of a corporation are concerned where, pursuant to statutory provisions in the State of incorporation or provisions contained in the certificate of incorporation, there is submitted to the vote of such stockholders a plan or agreement for a statutory merger or consolidation or reclassification of securities, or a proposal for the the transfer of assets of such corporation to another person in consideration of the issuance of securities of such other person or voting stock of a corporation which is in

control as defined in section 368(c) of the Internal Revenue Code of 1954, of such other person, under such circumstances that the vote of a required favorable majority (a) will operate to authorize the proposed transaction so far as concerns the corporation whose stockholders are voting (except for the taking of action by the directors of the corporation involved and for compliance with such statutory provisions as the filing of the plan or agreement with the appropriate State authority), and (b) will bind all stockholders of such corporation except to the extent that dissenting stockholders may be entitled, under statutory provisions or provisions contained in the certificate of incorporation, to receive the appraised or fair value of their holdings.

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